Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28
	)	

COMMENTS OF THE ONLINE PUBLISHERS ASSOCIATION

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EXECUTIVE SUMMARY

The Online Publishers Association (the "OPA"), representing many of the Internet's most trusted and respected online publishing brands, appreciates the opportunity to submit comments in this proceeding, and supports the Commission's goal of promoting and protecting an open Internet. Just as the OPA and its members focus on consumers and providing trusted and well-respected content to those consumers, the OPA encourages the Commission to focus this proceeding on the consumer experience. Open Internet rules adopted by the Commission should both encourage investment and innovation in content creation for consumers, and ensure that the Internet is an open platform that supports consumer choice and the open exchange of ideas and information.

In these comments, the OPA encourages the Commission to: (1) apply its Section 706 authority, as suggested by the D.C. Circuit, directly to "broadband providers" to encourage broadband deployment; (2) continue requiring transparency of ISP network management practices and ISP network performance, with certain enhancements, and require limited transparency of commercial terms only when there is a bona-fide complaint or Commission-instigated investigation; (3) adopt the no-blocking rule from the Commission's *2010 Open Internet Order* and clarify that the rule does not preclude broadband providers from negotiating individualized, differentiated arrangements; and (4) consider, if necessary, peering and interconnection relationships in the Commission's separate inquiry.

By adopting the right measures in this proceeding, the OPA believes the Commission can further its goal of fostering an open Internet that encourages innovation, content creation, competition, economic growth, and free expression to the benefit of consumers nationwide.

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The Online Publishers Association (the "OPA") offers these comments in response to the Commission's proposals for policies and regulations to ensure an open Internet.[1] The OPA, representing many of the Internet's most trusted and respected online publishing brands, supports the Commission's goal of protecting and promoting the Internet as an open platform for innovation, competition, economic growth, and free expression.[2] An open Internet enables innovators to create and offer new content, applications and services, and it allows development and distribution of new technologies by a broad range of sources, including broadband providers that operate the network.[3] However, as the Commission notes, it is important to remember "that each broadband provider can either add to the benefits that the Internet delivers to Americans – by maintaining Internet openness and by extending the reach of broadband networks – or it can threaten those benefits – by restricting its customers from the Internet and preventing edge

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[1] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, FCC 14-61 (rel. May 15, 2014) ("NPRM").

[2] *See* NPRM, ¶ 11. OPA members, as providers of content, are defined by the Commission as "edge providers." NPRM at n.3

[3] *See Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, ¶ 13 (2010), *aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC,* 740 F.3d 623 (D.C. Cir. 2014) ("*2010 Open Internet Order*").

providers from reaching consumers over robust, fast and continuously improving networks."[4] The OPA shares these concerns.

In these comments, the OPA encourages the Commission to: (1) apply its Section 706 authority, as suggested by the D.C. Circuit, directly to "broadband providers" to encourage broadband deployment;[5] (2) continue requiring transparency of Internet service provider ("ISP") network management practices and ISP network performance, with certain enhancements proposed by the Commission, and require limited transparency of commercial terms only when there is a bona-fide complaint or Commission-instigated investigation; (3) adopt the no-blocking rule from the Commission's *2010 Open Internet Order* and clarify that the rule does not preclude broadband providers from negotiating individualized, differentiated arrangements;[6] and (4) consider, if necessary, peering and interconnection relationships in the Commission's separate inquiry.

I. BACKGROUND.

Founded in 2001, the OPA is dedicated to representing high-quality online content providers and promoting the online publishing industry's unique role in the future of digital media. OPA members include many of the Internet's most trusted and respected online publishing brands,[7]

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[4] NPRM, ¶ 5.

[5] *See* 47 U.S.C. § 1302(a-b); *see also Verizon v. FCC*, 740 F.3d 623, 639-640 (D.C. Cir. 2014) (finding that the Commission's imposition of open Internet regulations under Section 706 authority was reasonable because the rules "not only apply directly to broadband providers, the precise entities to which section 706 authority to encourage broadband deployment presumably extends, but also seek to promote the very goal that Congress explicitly sought to promote.").

[6] *See 2010 Open Internet Order*, ¶ 62.

[7] OPA members include A&E Networks, A.H. Belo Corporation, About.com, AccuWeather, AMC Networks, The Business Journals, AOL News, the Associated Press, BBC.com, Bloomberg, CBS Interactive, CNBC, Conde Nast, ConsumerReports.org, Cox Media Group, Digital First Media, Discovery Communications, Disney Interactive Media Group, Edmunds.com; ESPN.com, Everyday Health, Financial Times, Forbes, FoxNews.com, Future, Gannett, Harvard Business Publishing, Hearst Corporation, International Data Group, MarthaStewart.com, Meredith, National Geographic, NBC News Digital, New York/mymag.com, The New York Times, NPR, Purch, Slate, Spanfeller Media Group, The Street, Thompson Reuters, Time Inc., Univision Communications, Inc., USA

collectively reaching an unduplicated audience of 220.4 million unique visitors – equivalent to 100% reach of the U.S. online population – monthly. Together, OPA members represent the public face of the online publishing industry. With well-established track records of editorial quality and integrity, credibility and accountability, OPA members are committed to the production of high-quality news and innovative new content, information, and entertainment to enrich the end user online experience.

In the view of OPA members, the consumer experience should be the focus of this proceeding. The OPA agrees with the Commission that ISPs should not restrict consumers from accessing lawful content, websites and applications.[8] Consumer access to online content over an open Internet has had a wide-ranging impact on how consumers live their lives – *e.g.*, "the way people get, share and create news … the way they learn; the nature of their political activity; their interactions with government; the style and scope of their communications with friends and family; and the way they organize in communities."[9] For content innovation to continue flourishing online, however, and for broadband to serve more social objectives, such as enhancing access to education and healthcare, the Commission should, consistent with the *2010 Open Internet Order*, adopt open Internet principles that continue to encourage investment and innovation in content creation, and

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Today, a Gannett Company, Viacom Media Networks, The Washington Post, The Weather Company, and WebMD.

[8] *See* NPRM, ¶¶ 26, 89; *see also* Section II, *infra*, explaining that a content provider exercising its business and editorial discretion to determine what content it makes available to consumers online – as well as when and how its content is distributed – is not the same as an ISP exercising its control over the network to block the lawful transmission of content to consumers.

[9] NPRM, ¶ 35, *citing* Susannah Fox & Lee Rainie, The Web at 25 in the U.S. 4, Pew Research Internet Project (2014), *available at*: http://www.pewinternet.org/files/2014/02/PIP_25th-anniversary-of-the-Web_0227141.pdf.

ensure that the Internet is an open platform that supports consumer choice and the open exchange of ideas and information.[10]

II. THE COMMISSION SHOULD APPLY ITS SECTION 706 AUTHORITY, AS SUGGESTED BY THE D.C. CIRCUIT, DIRECTLY TO BROADBAND PROVIDERS TO ENCOURAGE BROADBAND DEPLOYMENT.

In the NPRM, the Commission asserts that Section 706 provides it with ample authority to adopt rules to protect and promote the open Internet.[11] To the extent Section 706 provides the Commission with this statutory authority, the OPA strongly urges the Commission to exercise its authority within the scope of the court's opinion in *Verizon v. FCC*.[12] The court found that Section 706(a) and (b) could reasonably be interpreted to grant the Commission authority to adopt open Internet regulations ***for the purpose of encouraging broadband deployment*** but made it clear that this authority is ***limited in scope***.[13] The court specifically found that imposition of open Internet requirements on ***broadband providers*** is reasonable under Section 706 because (1) the rules "apply directly to broadband providers, the precise entities to which section 706 authority to encourage broadband deployment presumably extends," and (2) the rules seek to promote broadband deployment – "the very goal that Congress explicitly sought to promote" under Section 706.[14]

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[10] Because Internet openness enables widespread innovation and allows all end users and edge providers to create and determine the success or failure of content, applications, services, and devices, an open Internet has the potential to maximize commercial and non-commercial innovations that address key national challenges – including improvements in health care, education, and energy efficiency that benefit the economy and civic life. *See* NPRM, ¶ 35.

[11] *See* NPRM, ¶ 142.

[12] Section 706(a) provides that the Commission shall "encourage the deployment … of advanced telecommunications capability" while Section 706(b) further provides that if the Commission determines that "advanced telecommunications capability" is not being deployed in a reasonable and timely fashion, it shall "take immediate action to accelerate deployment of such capability … ." *See* 47 U.S.C. § 1302(a-b).

[13] *Verizon*, 740 F.3d at 639-640.

[14] *Id.* (emphasis provided).

Contrary to assertions made by the National Cable & Telecommunications Association ("NCTA"), there is no statutory authority to extend Section 706 regulations to edge providers. NCTA asserts that "blocking of online access to lawful content or services by edge providers themselves could also dampen end-user demand and thereby pose a comparable risk to investment in broadband deployment."[15] However, a content provider exercising its business and editorial discretion to determine what content it makes available to consumers online – as well as when and how its content is distributed – is not the same as an ISP exercising its control over the network to block the lawful transmission of content to consumers. Indeed, court precedent makes clear that imposing government regulations that dictate to content providers what content they must make available – as well as when and how they make their content available – would be a clear violation of content providers' First Amendment speech rights.[16]

The OPA agrees with the Commission that, in keeping with the scope and definitions of the 2010 open Internet rules, which the OPA supports, any open Internet rules adopted in this proceeding should apply only to the provision of "broadband Internet access service,"[17] and ***not*** to

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[15] *See* Comments of the National Cable & Telecommunications Association, GN Docket No. 14-28, at 10-11 (filed March 26, 2014) ("But blocking of online access to lawful content or services by edge providers themselves could also dampen end-user demand and thereby pose a comparable risk to investment in broadband deployment. … Accordingly, any forthcoming exploration of a new no-blocking rule should expressly include requests for comment on the need to apply such restrictions to edge providers.").

[16] *See, e.g., Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974) (finding government compulsion of a newspaper to publish content it otherwise would not have published violated the First Amendment).

[17] *See* NPRM, ¶¶ 54-58. The Commission defined "broadband Internet access service" as: "A mass market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this part." NPRM, ¶ 54; *see also 2010 Open Internet Order*, ¶ 44.

edge provider activities, such as the distribution of content or applications over the Internet."[18] The Commission – and most private-sector stakeholders – have always correctly understood that the open Internet principles apply only to the provision of broadband Internet access service.[19] The open Internet rules were an outgrowth of the Commission's *Internet Policy Statement*,[20] which was specifically intended to protect against the harms to the open Internet that might result from ***broadband providers'*** subsequent conduct.[21] As emphasized by the Commission, broadband providers control access to the Internet for their subscribers and for anyone wishing to reach those subscribers.[22] Thus, broadband providers are capable of blocking, degrading, or favoring any Internet traffic that flows to or from a particular subscriber.[23] The open Internet rules are aimed at preventing broadband provider practices that would restrict the ability of edge providers to reach end users, and that would restrict end users from freely choosing which edge providers to patronize.[24] Accordingly, the regulations, both existing and proposed, are properly designed to regulate broadband providers and the networks that facilitate the delivery of content to consumers – not the providers of that content.

For all of these reasons, to the extent Section 706 provides the Commission with authority

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[18] *2010 Open Internet Order*, ¶ 50 (emphasis provided); *see also* NPRM, ¶ 58 ("The *Open Internet Order* also established that the rules did not apply to … edge provider activities, such as the provision of content on the Internet.").

[19] *See 2010 Open Internet Order*, ¶ 50 ("The Commission has always understood those principles to apply to broadband Internet access service only, as have most private-sector stakeholders."). The Communications Act particularly directs the Commission to "prevent harms related to the utilization of networks and spectrum to provide communication by wire and radio." *2010 Open Internet Order*, ¶ 50; *see also* 47 U.S.C. § 151.

[20] *See 2010 Open Internet Order*, ¶ 50; *see also Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, Policy Statement, 20 FCC Rcd 14986 (2005).

[21] *See 2010 Open Internet Order*, ¶ 50.

[22] *2010 Open Internet Order*, ¶ 50.

[23] *See 2010 Open Internet Order*, ¶ 50.

[24] *See* NPRM, ¶ 26.

to implement certain open Internet rules, the Commission should, consistent with the court's decision in *Verizon v. FCC*, exercise its authority in a manner that makes clear that open Internet regulations apply directly to broadband providers in order to encourage broadband deployment.

III. THE COMMISSION SHOULD CONTINUE REQUIRING TRANSPARENCY OF ISP NETWORK MANAGEMENT PRACTICES AND ISP NETWORK PERFORMANCE, WITH CERTAIN ENHANCEMENTS, AND REQUIRE LIMITED TRANSPARENCY OF COMMERCIAL TERMS ONLY WHEN THERE IS A BONA-FIDE COMPLAINT OR COMMISSION-INSTIGATED INVESTIGATION.

The OPA agrees with the Commission that access to accurate information about ISP practices encourages competition, innovation, and high-quality services for consumers.[25] Indeed, transparency is an integral element of ensuring any competitive marketplace. The OPA believes that the transparency rule from the *2010 Open Internet Order* has generally worked well.[26] In that order, the Commission found that effective disclosure of ISP network management practices and network performance promotes competition – as well as innovation, investment, end-user choice, and broadband adoption – in at least five ways:[27]

- First, the Commission found that disclosure ensures that end users can make informed choices regarding the purchase and use of broadband service, which promotes a more competitive market for broadband services and can thereby reduce ISP incentives and the ability of ISPs to violate open Internet principles.

- Second, as end user confidence in ISP practices increases, end user adoption of broadband services also should increase, leading to additional investment in Internet infrastructure.

- Third, disclosure supports innovation, investment, and competition by ensuring that edge

[25] *See* NPRM, ¶ 66.

[26] The 2010 transparency rule provides:

> A person engaged in the provisions of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding the use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings. *2010 Open Internet Order*, ¶ 54; *see also* NPRM, ¶ 63.

[27] *See 2010 Open Internet Order*, ¶ 53.

providers have the technical information necessary to create and maintain online content, applications, services, and devices, and to assess the risks and benefits of embarking on new projects.

- Fourth, disclosure increases the likelihood that broadband providers will abide by open Internet principles, and that the Internet community will identify problematic conduct and suggest fixes. Transparency thereby increases the chances that harmful practices will not occur in the first place and that, if they do, they will be quickly remedied, whether privately or through Commission oversight.

- Finally, the Commission found that transparency will enable the Commission to collect information necessary to assess, report on, and enforce the open Internet rules.

For all of these reasons, the OPA believes that the Commission should continue oversight of the open Internet using the transparency rule from 2010, but certain enhancements proposed in the NPRM also may be useful. With respect to the 2010 transparency rule, the Commission stated that "effective disclosures will likely include" information concerning "some or all" of the following topics: "(1) network practices, including congestion management, application-specific behavior, device attachment rules, and security measures; (2) performance characteristics, including a general description of system performance (such as speed and latency) and the effects of specialized services on available capacity; and (3) commercial terms, including pricing, privacy, and redress options."[28] The Commission also clarified that the 2010 transparency rule did not require public disclosure of "competitively sensitive information or information that would compromise network security or undermine the efficacy of reasonable network management practices."[29] The OPA supports these disclosure guidelines from 2010, subject to the clarification that disclosure of competitively sensitive information is not required, and that limited disclosure of commercial terms only should be required with respect to a bona-fide complaint or a Commission-instigated investigation.

The OPA also believes the Commission should enhance the existing transparency rule by adopting its proposal to require disclosure of network practices, including "packet loss, packet

[28] NPRM, ¶ 64; *see also 2010 Open Internet Order*, ¶ 56.

[29] NPRM at n. 150; *see also 2010 Open Internet Order*, ¶¶ 55-57.

corruption, latency, and jitter in addition to upstream and downstream speed."[30] The OPA supports the Commission's proposal to require ISPs to disclose "when they make changes to their network practices as well as any instances of blocking, throttling, and pay-for-priority arrangements, or the parameters of default or 'best effort' service as distinct from any priority service."[31] There certainly will be situations in which ISPs are not responsible for network problems experienced by end users, such as latency, slow download speeds, or packet loss emanating from a host website. In these circumstances, however, ISPs have the ability to inform end users that Internet problems they are experiencing are due to causes external to the network.

As emphasized by the Commission, requiring transparency from ISPs will enable end users and edge providers to ensure that they are able to make informed decisions. ISP transparency will enable consumers to ensure that they receive the content and services they purchased, are charged the correct amount, and are informed about any network management practices that may impede their ability to access or utilize content or services.[32] For edge providers, as the Commission emphasized, requiring disclosure of ISP network management practices and ISP network performance encourages innovation by ensuring that edge providers are able to access ISP network information that is necessary to develop and deploy innovative new applications, content and services.[33] The OPA does not believe the Commission needs to adopt special transparency requirements for edge providers or certain categories of edge providers.[34] The information made transparent to consumers should be sufficient to allow all edge providers to understand how best to reach their end users.

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[30] NPRM, ¶ 73.

[31] NPRM, ¶ 78.

[32] *See* NPRM, ¶ 69.

[33] *See* NPRM, ¶¶ 66, 75.

[34] *See* NPRM, ¶ 75.

Finally, although the OPA supports transparency as an important element of a competitive market, it does not support mandatory public disclosure of all terms of ISP commercial arrangements. OPA members have particular concerns, based on prior merger proceedings, that commercial terms, even if afforded confidential treatment by the Commission, have nevertheless made it into the public domain, exposing confidential business and trade information, which is damaging to competition, generally.

IV. OPA MEMBERS SUPPORT THE COMMISSION'S NO-BLOCKING PROPOSAL AND THE CLARIFICATION THAT ISPs SHOULD BE FREE TO NEGOTIATE INDIVIDUALIZED, DIFFERENTIATED ARRANGEMENTS WITH EDGE PROVIDERS, SUBJECT TO COMMERCIAL REASONABLENESS AND ENFORCEMENT BACKSTOPS.

The OPA supports the Commission's proposal to implement the text of the no-blocking rule adopted in the *2010 Open Internet Order*.[35] OPA members view the no-blocking rule as the core of the open Internet principles and agree with the Commission that the freedom to send and receive ***lawful*** content, and to use and provide applications and services, without fear of blocking, is essential to protecting and promoting the open Internet.[36] Although there should be no blocking of ***lawful*** content, content owners, such as OPA members, must have the ability to work with ISPs to prevent the transmission of ***unlawful*** content and prevent access to unlawful applications, services, or devices. Piracy of copyright-protected content continues to be a significant problem. At least 43

[35] The 2010 no-blocking rule provided:

> A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.
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> A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephone services, subject to reasonable network management. NPRM, ¶ 94; *see also 2010 Open Internet Order*, ¶ 63.

[36] *See* NPRM, ¶¶ 89, 94.

unique rogue websites have attracted more than 53 billion visits per year.[37] Global sales of counterfeit goods across many industries via the Internet from illegitimate retailers reached $135 billion in 2010,[38] and the U.S. economy lost $58 billion in total output in 2007 due to global piracy threats.[39]

The OPA also supports the Commission's proposal to allow ISPs to negotiate individualized, differentiated arrangements with edge providers, subject to the requirement that such agreements are commercially reasonable. For example, as the Commission rightly notes, there is concern around excessive fees that could be charged for prioritized access, which could "reduce edge provider entry, suppress innovation, and depress consumer demand."[40] The Commission proposes to adopt a "commercially reasonable" standard that would prohibit as commercially unreasonable "those broadband providers' practices that, based on the totality of the circumstances, threaten to harm Internet openness and all that it protects."[41] While supportive of the application of a "commercially reasonable" standard, the OPA is concerned that the standard, as articulated by the Commission, may be too vague. The OPA encourages the Commission to adopt a "commercially reasonable" standard that is more clearly defined and, perhaps, share examples of ISP practices that, over time, are not considered commercially reasonable.

In addition, the OPA supports the Commission's proposal that any individualized, differentiated agreements should not degrade content or service on the public Internet.[42] The OPA

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[37] *See* MarkMonitor, *Traffic Report: Online Piracy and Counterfeiting*, at 4 (January 2011), *available at:* https://www.markmonitor.com/download/report/MarkMonitor_-_Traffic_Report_110111.pdf.

[38] *See* http://www.theglobalipcenter.com/counterfeit-goods-135-billion/.

[39] *See* Stephen Siwek, *The True Cost of Copyright Industry to the U.S. Economy*, at 14 (Oct. 2007), *available at:* http://www.ipi.org/docLib/20120515_CopyrightPiracy.pdf.

[40] NPRM, ¶ 6.

[41] NPRM, ¶ 116.

[42] *See* NPRM, ¶ 95.

encourages the Commission to make clear that broadband providers must continue to deliver traditional "best efforts" service that meets consumer performance expectations for common broadband applications, including email, web searching, streaming video, video conferencing, and gaming, with recourse to the Commission if there is evidence that individualized ISP agreements are degrading service on the public Internet. This standard would be flexible and could evolve over time as common consumer uses of the Internet change. Adopting a flexible and consumer-facing approach like this one will provide ISPs and edge providers the flexibility to reach arrangements that promote innovation, protect against ISP behavior that diminishes the ability of edge providers to deliver content and applications over standard Internet connections, and avoid a prescriptive technical standard which will quickly become outdated.

V. THE COMMISSION SHOULD, IF NECESSARY, CONSIDER PEERING AND INTERCONNECTION RELATIONSHIPS IN ITS SEPARATE INQUIRY.

Although the OPA does not, at this time, have a position on the regulation of peering and interconnection relationships and agreements, the OPA agrees with the Commission that it should retain the approach adopted in the *2010 Open Internet Order* that the open Internet rules do not apply to the exchange of traffic between networks, whether that exchange constitutes peering, paid peering, content delivery network connections, or interconnection.[43] As the NPRM explains, the *2010 Open Internet Order* applied to a broadband provider's use of its own network but did not apply beyond "the limits of a broadband provider's control over the transmission of data to or from its broadband customers."[44] The OPA believes the Commission should adopt this same approach with respect to any open Internet rules adopted in this proceeding. Accordingly, the OPA believes this proceeding is not the proper forum for the Commission to consider peering and interconnection issues. Instead, if the Commission deems it necessary to review peering and interconnection

[43] *See* NPRM, ¶ 59; *see also 2010 Open Internet Order*, ¶ 47, n. 150.

[44] NPRM, ¶ 59.

relationships and agreements, the OPA strongly encourages the Commission to consider peering and interconnection in its separate inquiry on these issues.[45]

VI. CONCLUSION.

The OPA appreciates the opportunity to submit comments in this proceeding and supports the Commission's goal of promoting and protecting an open Internet. Just as the OPA and its members focus on consumers and providing trusted and well-respected content to those consumers, the OPA encourages the Commission to focus this proceeding on the consumer experience. OPA members are dedicated to providing consumers with innovative, high-quality content. For innovation in content creation to continue flourishing online, however, it is essential that the Internet continue to serve as an open and effective platform for the exchange of ideas and information. By adopting the measures proposed by the OPA in these comments, the Commission can further its goal of fostering an open Internet that encourages innovation, content creation, competition, economic growth, and free expression to the benefit of consumers nationwide.

Respectfully submitted,

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[45] *See* "Statement by FCC Chairman Tom Wheeler on Broadband Consumers and Internet Congestion," Press Releases (rel. June 13, 2014), *available at*: http://www.fcc.gov/document/chairman-statement- broadband-consumers-and-internet-congestion.